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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-929

DAVID R. McGEORGE CAR CO., INC., *Petitioner,*

v.

LEYLAND MOTOR SALES, INC.,

and

BRITISH LEYLAND MOTORS INC., *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DEALER ACT ISSUE

Rather than specifically reply to the mischaracterizations and misapplications of facts and law in Respondents' Brief, Petitioner asserts, and the record is absolutely clear, that the following is uncontroverted.

Petitioner had been an excellent Triumph dealer since 1963 and, in fact, had been one of the leading Triumph dealers in the State of Virginia. The failure to renew its franchise was due *solely* to its refusal to accede to Respondents' nationwide marketing scheme.

Under that scheme, all Triumph dealers—during a period of shortage of Triumphs—were told that their desirable Triumph franchises would be terminated unless they agreed to purchase from Respondents unwanted Rover automobiles.

Indeed, unless Petitioner had been a good dealer, there would have been no reason for Leyland to attempt to so coerce and intimidate him to purchase such Rover automobiles.

As an integral part of this scheme of coercion and intimidation, Petitioner and other similar dealers were actually shorted their fair share of Triumph automobiles unless they agreed also to purchase the Rovers.

It is this coercion and intimidation that both the Trial Court and the Fourth Circuit found actionable under the Dealers Day In Court Act up to the time of nonrenewal.

Both Courts, however, stated in effect that despite such coercion and intimidation up to the time of nonrenewal, Respondents were justified in failing to renew Petitioner's franchise because it was a "rational business decision".

Thus, under the Fourth Circuit decision, the same illegal activity which resulted in a verdict for damages suffered prior to the termination and which itself was the sole cause of termination is protected from termination damages because of Respondents' alleged "rational business decision".

The character of the national marketing scheme did not change before and after nonrenewal. The scheme was clearly proscribed prior to nonrenewal, but, according to the Fourth Circuit, justified by alleged

business reasons after nonrenewal. The findings are inconsistent within themselves and are in conflict with decisions in point in other Circuits.

The decisions of the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970) and the Tenth Circuit in *American Motor Sales Corporation* v. *L. G. Semke*, 384 F.2d 192 (10th Cir. 1967), clearly reject a defense of "business justification" for termination benefiting only the manufacturer under the Dealers Day In Court Act.

In addition, it is undisputed that the Fourth Circuit reached into the record and excerpted a letter relating to Toyota—on which there was no testimony whatever in the trial and which was not considered by the Trial Court—and drew conclusions which were both contrary to the admission of Respondents themselves and the findings of the Trial Court that Petitioner's failure to purchase Rover automobiles was the sole reason for its nonrenewal.

If the Fourth Circuit decision prevails, the Dealers Day In Court Act is left toothless inasmuch as manufacturers almost always have, from their point of view, a good business reason for their coercion and intimidation.

The Act does not require a marriage for life. Its only purpose is to guarantee the dealer freedom from the coercion and intimidation of the manufacturer. That coercion and intimidation is actionable whether it relates to damages suffered prior to termination because of the prohibited conduct or whether it relates to damages suffered after termination as a result of the dealer not acceding to the prohibited conduct.

ROBINSON-PATMAN CLAIM

In regard to the Fourth Circuit's reversal of the Trial Court on the Robinson-Patman Act, the Circuit entirely disregarded the finding of the Trial Judge in regard to custom and usage and looked only to the contract itself. There is no evidence in the record to support the terms and provisions of the contract as expropriated by the Fourth Circuit. In fact, Respondents never offered any testimony at trial demonstrating or even indicating that deliveries were complete upon arrival of shipments at port.

To the contrary, all relevant evidence and findings of fact by the Trial Judge, establish that the historical, usual and customary practice of Respondents was to deliver ordered vehicles to Petitioner's and other dealers' places of business. Pursuant to such delivery service, Respondents' field personnel testified that delivery of Petitioner's Triumphs was delayed on the truck so as to permit priority delivery of Triumphs to dealers who also purchased Rovers.

Simply, there is no basis for the Fourth Circuit's disregard of explicit Trial Court findings of fact on this count, and for the Circuit's unfounded substitution of facts contrary to the record.

TIE-IN ARRANGEMENT

In regard to the illegal tie in, neither the Trial Court nor the Fourth Circuit based their decisions on the lack of sufficient commerce. Rather, they based their Opinions on the lack of evidence of an "exclusionary condition".

Section 3 of the Clayton Act, of course, applies to both tie-ins and exclusive dealing. There was no testimony in the Trial Court on exclusionary conditions

because this is a tie-in and not an exclusive dealing situation.

Both Courts, therefore, ignored this Court's tie-in decisions under a misapprehension that there is no difference between a tie-in and an exclusive dealing violation. They applied the wrong law.

A Supreme Court decision in this matter would help to clarify the distinction between tie-in and exclusive dealing arrangements under Section 3 of the Clayton Act. It would *also* correct misapprehensions in lower courts as to the difference in proofs required as a condition to a finding of a *per se* violation under an illegal tie-in challenged under the Sherman Act and one challenged under the Clayton Act.

Finally this case is not as Respondents argue, a matter of a small manufacturer attempting to break into the market. British Leyland was and is the General Motors of England. Triumph was a highly desirable automobile as were the Austin Healy and MG, also manufactured and marketed by British Leyland.

Their argument is akin to asserting that Edsel was merely a small manufacturer attempting to break into the automotive market without mentioning that Edsel was manufactured and marketed by the Ford Motor Company.

Likewise, if after it was clear to Ford that there was no market for Edsels, it attempted to force all of its Ford dealers to purchase Edsels as a condition of receiving their quota of Fords and not having their Ford dealerships terminated, is there any question but that both a violation of the antitrust laws and the Dealers Day In Court Act would result?

CONCLUSION

For the reasons stated above, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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